Supreme Court, U. S.
FILED
OCT 4 1976
MICHAEL RODAK, JR., CLERK

Nos. 75-1760 and 75-1761

In the Supreme Court of the United States

October Term, 1976

Frank C. Hilton, petitioner

v.

United States of America

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

Robert H. Bork,
Solicitor General,

Richard L. Thornburgh,
Assistant Attorney General,

Roger A. Pauley,
Ivan Michael Schaeffer,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

NOS. 75-1760 AND 75-1761

FRANK C. HILTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 75-1760 is reported at 534 F. 2d 556 (Pet. App. A). The Memorandum and Order of the district court in that case is not reported (Pet. App. C). The judgment order of the court of appeals in No. 75-1761 (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals in No. 75-1760 was entered on March 30, 1976. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on May 6, 1976 (Pet. App. B). The judgment of the court of appeals in No. 75-1761 was entered on March 31, 1976. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on May 6,

1976 (Pet. App. B). The petitions for writs of certiorari were filed on June 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner may challenge on Fourth Amendment grounds grand jury subpoenas directed to a bank for copies of bank records relating to his accounts and the accounts of others (No. 75-1760).

2. Whether immunity was properly granted to a witness whose bank records were seized pursuant to a subpoena (Nos. 75-1760 and 75-1761).

3. Whether the jury should have been instructed that a witness who would have invoked his Fifth Amendment privilege against self-incrimination if called by either the prosecution or the defense was more available to the former because of its ability to grant immunity (No. 75-1761).

4. Whether the use of petitioner's income tax returns by the government on cross-examination violated statutes and regulations relating to the secrecy of such returns (No. 75-1761).

STATEMENT

1. Petitioner was the Secretary of the Department of Property and Supplies for the Commonwealth of Pennsylvania. In No. 75-1760, he was convicted following a non-jury trial in the United States District Court for the Western District of Pennsylvania of having violated the Hobbs Act (Count One; 18 U.S.C. 1951), of having willfully made and subscribed to an income tax return containing false statements (Count Two; 26 U.S.C. 7206(1)), and of having made a false material declaration to a duly impanelled grand jury (Count Three; 18 U.S.C. 1623). He was sentenced on Counts One and Three to five years' imprisonment, with eligibility for parole after one year, and on Count Two to three years' imprisonment, the sentences to run concurrently. The court of appeals affirmed (No. 75-1760 Pet. App. A; 534 F. 2d 556).

In No. 75-1761, petitioner was convicted following a jury trial in the United States District Court for the Middle District of Pennsylvania of having violated the Hobbs Act, 18 U.S.C. 1951. He was sentenced to a five-year term of imprisonment, to run concurrently with the sentence imposed by the United States District Court for the Western District of Pennsylvania in No. 75-1760. The court of appeals affirmed without opinion (No. 75-1761 Pet. App. A).

2. The relevant facts adduced at trial in No. 75-1760 are fully set forth in the opinion of the court of appeals (No. 75-1760 Pet. App. A, pp. 21-33). In brief, they show that petitioner and his wife borrowed $19,800 from the Keystone Bank in Lower Burrell, Pennsylvania, on September 5, 1968. An additional $3,000 was loaned by the bank to petitioner on October 30, 1971, by which time he was Pennsylvania State Secretary of Property and Supplies. Records maintained by the bank indicated that on July 19, 1972, there was a balance due on petitioner's loans of $18,523.49 and that the balance was repaid on that date with funds from the account of another depositor, David N. Oppenheim. Newspaper accounts appearing late in the spring of 1974 alleged that Oppenheim's payments of petitioner's loans were part of a "payoff" in exchange for the placement by petitioner of state insurance policies with Oppenheim, who was an insurance broker. This led to a federal investigation of petitioner's activities.

In July 1974, a federal grand jury in Pittsburgh subpoenaed the bank records relating to petitioner's loan transactions. The subpoenaed records showed that the loans had been repaid on July 19, 1972. Petitioner appeared before the grand jury and explained that payment had been made with funds obtained from his wife and from the sale of real estate. Additional bank records were subpoenaed in September 1974, which refuted petitioner's testimony by showing that payment of the loans came from Oppenheim's account. Records of Oppenheim's accounts were subpoenaed by the grand jury; they showed that Oppenheim had arranged for repayment of petitioner's loans. A third subpoena for Oppenheim's bank records and bank records of the loans to petitioner was delivered to the bank in October 1974. On the basis of the subpoenaed records, the grand jury returned an indictment against petitioner for perjury before the grand jury.

Petitioner moved to dismiss the indictment and suppress the evidence obtained pursuant to the October subpoena, claiming that the information had been obtained by coercion, threats, and duress on the part of the FBI agents who had served the subpoena and that the subpoena had been issued without authority.[1] After an evidentiary hearing, the district court denied the motions on the ground that petitioner lacked standing. Additional subpoenas were served on the bank in March 1975.

---

[1]The basis for this contention was the fact that the subpoena, which required production of the records "forthwith," had been issued by the prosecutor and had designated the F.B.I. agents as agents of the grand jury without the grand jury's knowledge, and had called for the records to be delivered on a date when the grand jury would not be sitting.

A motion by Oppenheim to quash the subpoenas for his bank records was denied. He thereupon refused to testify before the grand jury on Fifth Amendment grounds, whereupon he was granted immunity (No. 75-1760 Pet. App. A, p. 28). Oppenheim then testified before the grand jury, which thereafter returned a superseding three-count indictment, upon which petitioner ultimately was convicted, charging petitioner with extortion in violation of the Hobbs Act, income tax evasion, and perjury. Petitioner once again moved to dismiss and suppress, on essentially the same grounds as before. After oral argument, the motions were denied.

A non-jury trial followed. Various original bank records maintained by the bank were introduced at trial, as were photocopies of certain documents relating to Oppenheim's account and a copy of petitioner's income tax return for 1972. No records relating to petitioner's checking account were offered in evidence (No. 75-1760 Pet. App. A, pp. 28-30). The testimony at trial showed that Oppenheim had agreed to give petitioner a kickback of $31,587.13 of his commission of $78,351.91 on insurance purchased by the State through Oppenheim's firm and that the Keystone bank was used for this transaction.

3. In No. 75-1761, the evidence showed that petitioner arranged to have Anthony J. Trucco,[2] former Director of Insurance for the Commonwealth of Pennsylvania, place an autofleet insurance policy with Charles W. Ohle of the Ohle Insurance Company in order to obtain kickbacks from the premiums on that policy. Petitioner met with Trucco, Ohle, and a vice-president of the

---

[2]Prior to trial, Trucco pleaded guilty to violating 18 U.S.C. 1951.

insurance marketing company to determine the commission and to place the policy through the broker. Ohle agreed to pay petitioner and Trucco a 6% kickback on the premium on the policy (as opposed to calculating the kickback as a percentage of the commission), which resulted in a net income of $72,000 to Trucco and $74,000 to petitioner.

Petitioner testified that he did not receive any kickbacks from Ohle and attempted to portray himself as a highly successful businessman without any financial concerns. The government rebutted this testimony on cross-examination by reference to petitioner's income tax returns. However, these returns were not introduced into evidence.

ARGUMENT

1. In No. 75-1760, petitioner contends (Pet. 7-11) that the October subpoena was illegal and resulted in the unlawful seizure of both his bank records and those of David Oppenheim. This contention is foreclosed by *United States* v. *Miller*, No. 74-1179, decided April 21, 1976.[3]

2. Petitioner contends (No. 75-1760 Pet. 11; No. 75-1761 Pet. 8) that it was improper for the government to grant immunity to Oppenheim, who testified at both trials, since the government's knowledge of Oppenheim's

[3]Petitioner attempts to distinguish this case from *Miller* by bringing it within the holding of the California Supreme Court in *Burrows* v. *Superior Court*, 13 Cal. 3d 238, 529 P. 2d 590. Unlike *Burrows*, however, this case does not involve informal oral requests for information, but rather involves the production of documents pursuant to a grand jury subpoena. The subpoena in *Miller* was claimed to be defective for reasons similar to those alleged by petitioner here (see slip op. 3). Thus, there is no basis for distinguishing this case from *Miller*.

involvement with petitioner in the kickback scheme was based upon the allegedly illegally seized bank records.

But, since petitioner does not have a sufficient Fourth Amendment interest to challenge the validity of the subpoena and alleged seizure of records, see *Miller*, *supra*, he similarly lacks sufficient interest to complain that Oppenheim's testimony is the fruit of the asserted illegality. We note, moreover, that third parties generally lack standing to challenge the grant of immunity to prospective witnesses. See *United States* v. *Braasch*, 505 F. 2d 139, 146-147 (C.A. 7), certiorari denied, 421 U.S. 910; *United States* v. *Lewis*, 456 F. 2d 404 (C.A. 3); *Lopez* v. *Burke*, 413 F. 2d 992 (C.A. 7); *Bowman* v. *United States*, 350 F. 2d 913 (C.A. 9). Thus, petitioner is unable to sustain his contention concerning the grant of immunity to Oppenheim.

3. Petitioner also contends (No. 75-1761 Pet. 9) that the refusal of a potential witness, Herman J. Israel,[4] to testify at trial on behalf of either the defense or the prosecution because of his Fifth Amendment privilege against compelled self-incrimination was grounds for a "missing witness" instruction, since the government, unlike the defendant, had the ability to immunize the witness and thereby to make him available.[5] However, as the District of Columbia Circuit has correctly stated, the "large array of considerations which enter into the relatively rare use of immunity grants indicates that

[4]Israel was a bank officer at Keystone who aided in the handling of kickback payments to petitioner (No. 75-1760 Pet. App. A, pp. 30-31).

[5]At the close of the defense case, the parties stipulated that if Israel were called he would have refused to testify.

government reluctance to use this power cannot reasonably be equated to the failure of a litigant to produce an otherwise available witness." *Morrison* v. *United States*, 365 F. 2d 521, 524; see also *Bowles* v. *United States*, 439 F. 2d 536, 541-542 (C.A. D.C.). Denial of the requested instruction was therefore proper, and the court of appeals correctly rejected petitioner's contention (No. 75-1761 Pet. App. A).

4. Finally, petitioner contends (No. 75-1761 Pet. 10-11) that the possession and use of his federal income tax returns by the government violated applicable statutes and regulations. At trial, evidence was adduced by the defense in an attempt to show that petitioner had no financial motivation to violate the Hobbs Act. Petitioner asserted, for example, that he was a successful businessman prior to taking his position with the State and that he was independently wealthy. These assertions were contradicted by petitioner's tax returns, which failed to show petitioner as a successful businessman or as a person with substantial income from securities; rather, they showed petitioner as in need of money. Information obtained from these tax returns was introduced into evidence, although the returns themselves were not introduced. Use of income tax returns for such a purpose is proper and has been approved by the courts. See, *e.g.*, *United States* v. *Greenlee*, 517 F. 2d 899, 904-905 (C.A. 3); *United States* v. *Gross*, 511 F. 2d 910, 917-918 (C.A. 3).

When the government commenced its investigation of petitioner, it requested and received from the Internal Revenue Service copies of petitioner's federal income tax returns for 1970-1973.[6] The returns were obtained

[6]Petitioner based his 1970 tax return on the income averaging method of computation; therefore, the government was provided with information concerning preceding years as well.

pursuant to the United States Attorney's authority as set out in 26 C.F.R. 301.6103(a)-1(h). The procedures employed by both the United States Attorney's Office and the IRS were in compliance with the prevailing regulations, and thus the returns could properly be used at trial. *Laughlin* v. *United States*, 474 F. 2d 444, 453, n. 12 (C.A. D.C.), certiorari denied, 412 U.S. 941; *United States* v. *Tucker*, 316 F. Supp. 822 (D. Conn.).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

ROGER A. PAULEY,
IVAN MICHAEL SCHAEFFER,
Attorneys.

OCTOBER 1976.

DOJ-1976-10